

# Applicability of International Humanitarian Law in Asymmetric Warfare: A Review on Sri Lankan Civil War

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## Abstract

Today's armed conflicts are not the same as the conventional and systematic wars described in the history books. In the 21<sup>st</sup> century, the political concept of “War” has been replaced by the factual concept of “Armed Conflict.” International Humanitarian Law is the main international legal branch that governs and regulates armed conflicts. In the simple meaning, the ‘Law of War’. However, the irregular forms of modern armed conflicts are challenging the scope of the application of International Humanitarian Law on the contemporary battlefield.

In this 4<sup>th</sup> generation of warfare, States have lost their monopolistic authority in war. Non-state actors such as guerrilla movements & terrorist groups have increased their activities. In this sense, most of today's armed conflicts can be underlined as ‘Asymmetric Armed Conflicts’ generally warring between states and non-state actors.

However, the states and respective governments are reluctant to apply International Humanitarian Law to the internal asymmetric armed uprisings. At the same time, there are difficulties in classifying contemporary asymmetric armed conflicts into the conventional classification of warfare in accordance with the criteria adopted under International Humanitarian Law. These legal ambiguities have not been well examined yet. Therefore, these matters should be addressed according to jurisprudential and political parameters.

There is a lacuna in jurisprudential studies on ‘Asymmetric warfare and applicability of International Humanitarian Law (IHL) in Non-International Armed Conflicts (NIACs).’ This research, therefore, primarily seeks to fill the existing knowledge and research vacuum regarding asymmetric warfare with reference to the Sri Lankan context.

Keywords: Armed Conflict, Asymmetric Warfare, Civil War, Non-International Armed Conflict

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## 1. Research Problem

This research aims to explore the following research problem in accordance with the International Humanitarian Law perspective. The problem is: “Why do states reluctant to identify the internal asymmetric armed uprisings as non-international armed conflicts?”

## 2. Research Questions

The following research questions will examine the above main research problem.

- i. How do the states respond to internal asymmetric armed conflicts? (A review on the Sri Lankan Civil War)
- ii. What are the challenges of International Humanitarian Law in the contemporary context of Non-International Armed Conflicts and how could be overcome these challenges?

## 3. The Objective

The primary objective of this research is to examine the legal ambiguity that exists in identifying internal asymmetric armed uprisings as non-international armed conflicts. Accordingly, this research mainly discusses the asymmetrical nature of the Sri Lankan Civil War which lasted for nearly three decades.

## 4. Literature Review

The scope and limitation of this research are unique. It attempts to fill a lacuna prevailing the existing knowledge regarding asymmetric warfare in accordance with the International Humanitarian Law. Furthermore, the study especially focuses on the Civil War in Sri Lanka according to the IHL perspective. Although, there are many academic writings on conventional armed conflicts most of those academic works do not focus on the notion of asymmetric warfare. Therefore, this research focuses on evaluating the concept of asymmetric warfare from the perspective of International Humanitarian Law.

Dr, Rohan Gunaratne <sup>1</sup> is one of the experts in the study of terrorism and asymmetric warfare. He always focuses on his academic researches about the emergence of terrorism, counter-terrorism and the rehabilitation of terrorists. He was the co-author of the book named '**The Handbook of Terrorism in the Asia-Pacific**'<sup>2</sup> This book provides an overview of terrorism in the Asia-Pacific, the evolution of threats, and the current and emerging threats faced by countries with the rise of the Islamic State (ISIS). In his book '**The Changing Face of Terrorism**'<sup>3</sup> Dr, Gunaratne discusses how dramatically the face of terrorism has changed in the last decade. Instead of resisting globalization, terrorist groups have taken full advantage of the widespread availability of communication technologies, inexpensive travel, porous borders, privatization of security, and access to saturated weapons markets to grow rapidly in strength, size, and reach. In this book, he tried to describe the emergence of asymmetric warfare based on terrorism. However, Dr, Rohan Gunaratna does not expect to address the legal perspective on his research area by these two books. Especially the applicability of the International Humanitarian Law on asymmetric warfare. Therefore, in this research the researcher will mainly discuss the legal perspective of asymmetric warfare. Mr, Latheef Farook <sup>4</sup> is a well-known international journalist who has a Sri Lankan origin. He is the author of the '**War on Terrorism: The untold Truth**'<sup>5</sup> published in 2006. In this book, the author argues that global terrorism is not an independent outcome of isolated extremism, but more precisely, it is an artificially created phenomenon by global capitalism. As a journalist, Mr, Farook does not discuss the legal background on terrorism based asymmetric warfare and NIACs, his arguments are mainly based on the political perspective. Eric David in '**Internal (Non-International) Armed Conflicts**'<sup>6</sup> provides an overall picture of NIACs and applicable law and most importantly discusses the criteria that should be present to differentiate a NIAC from other situations of violence. The nature of the actors in an armed conflict is also explained in his research. However, the author does not go into details, slightly touches on the difference between combatants and terrorists.

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<sup>1</sup> Rohan Gunaratna is Professor of Security Studies at the S. Rajaratnam School of International Studies, Nanyang Technology University, Singapore.

<sup>2</sup> Handbook of Terrorism in the Asia-Pacific by Rohan Gunaratna and Stefanie Kam (Eds.). ICPVTR / Edited Books / Special Issues 01 MAY 2016

<sup>3</sup> The Changing Face of Terrorism, Rohan Gunaratna, Eastern University Press, 2004

<sup>4</sup> Sri Lankan journalist and the Author of the 'War on Terrorism: The untold Truth'.

<sup>5</sup> Latheef Farook, South Asia News Agency Publication (2006).

<sup>6</sup> The Oxford Handbook of International Law in Armed Conflict, Andrew Clapham & Paola Gaeta (eds.) 2014.

The theme of this research has not been discussed by any Sri Lankan scholar before. Although there have been several political and sociological studies on the armed uprisings in Sri Lanka, the legal discussions are limited. Therefore, this study particularly focuses on examining the Civil War in Sri Lanka according to the International Humanitarian Law perspective. Accordingly, this study attempts to fill the existing knowledge and research gap regarding asymmetric warfare with reference to the Sri Lankan context.

## 5. Hypothesis

International Humanitarian Law can be considered as the jurisprudence that sets the rules for regulating armed conflicts. However, the emerging trends of the contemporary battlefield reveal the lacunas of the conventional treaties and customs on war. In particular, Asymmetrical warfare transcend the boundaries of the conventional classification of armed conflict. Due to certain provisions in International Humanitarian Law, states are reluctant to recognize some of the asymmetrical internal armed uprisings as non-international armed conflicts. This creates an ambiguity on the applicability of IHL in such scenarios. Therefore, the traditional legal parameters need to be revised to allow for the absorption of many asymmetric non-international armed conflicts within the jurisdiction of the IHL.

## 6. Methodology

This research is mainly literature-based. Therefore, this study has primarily focused on conventions, treaties, judicial decisions and customary international legal principles. Also, the research refers to relevant scholarly opinions outlined in textbooks, journal articles and other appropriate reading materials as secondary sources. Thus, this study does not involve a field research component.

## 7. Responding to Asymmetric Warfare: The Sri Lankan Civil War (*Eelam War*)

The nearly three decades of non-international armed conflict in Sri Lanka that emerged between the Sri Lanka government and Liberation Tigers of Tamil Eelam (LTTE) from the early 1980s came to an end after Sri Lankan armed forces demolished the leadership of LTTE in 2009. According to the conservative tally by independent monitors analyzed by Human Rights Watch, civilian casualties at 7,000, including 2,000 fatalities were reported during the final phase of the Sri Lankan civil war in 2009.<sup>7</sup>

### *7.1 History and background of the Conflict*

As in many other post-colonial countries, the Sri Lankan civil war has an ethnic root. The desire of mainly Sri Lankan Tamils for an independent state named 'Eelam' for themselves led to a civil war that lasted from 1983 to 2009.<sup>8</sup>

The ethnic divisions between the Sinhalese and the Tamils can be traced back to the pre-colonial period. After independence, the governing power shifted to the Indigenous, and the Sinhalese-led government enacted several laws that restricted the rights of other ethnic minorities. In 1948, the Citizenship Act<sup>9</sup> was introduced, which denied citizenship and voting rights specifically to Indian-born Tamils. This was followed by the Sinhala Only Act, making Sinhalese the only official language, in 1956.<sup>10</sup> After that Tamil groups called for the devolution of power and equal linguistic status. Although the Tamil Federal Party and the government signed a pact in 1957<sup>11</sup> that assured Tamils of greater regional autonomy, it was opposed by conservative Sinhalese Buddhists nationalists.

As a result of the long-term oppression by the Sinhalese community, armed separatist movements led by Tamil youth began to campaign for an independent sovereign state in the northern and eastern part of the country, in the mid-1970s. The Liberation Tigers of Tamil Eelam (LTTE) was formed by Velupillai Prabhakaran in 1976 as an armed organization to fight for a Tamil sovereign

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<sup>7</sup> Human Rights Watch, War on the Displaced: Sri Lankan Army and LTTE Abuses against Civilians in the Vanni, 2009, p.1.

<sup>8</sup> Sasiwan Chingchit, with Patthiya Tongfueng and Megumi Makisaka, The State of Conflict and Violence in Asia, The Asia Foundation 2017, p.158.

<sup>9</sup> Citizenship Act No.18 of 1948.

<sup>10</sup> Official Language Act No.33 of 1956.

<sup>11</sup> Bandaranaike-Chelvanayakam pact, 1957.

state, against the Sri Lankan government.<sup>12</sup> Initially, approximately 37 Tamil militia groups including LTTE were operating in northern and eastern areas of the island.<sup>13</sup> Eventually, the LTTE emerged as the most organized separatist group among other organizations and started 30 years of continuous civil war with the government.

According to Professor Sumit Ganguly, the Sri Lankan Civil War can be frequently divided into four distinct phases, starting in 1983 with the anti-Tamil violence in the capital city of Colombo and the southern part of the country known as 'Black July'. This first phase culminated with the Indian intervention in the conflict in 1987.<sup>14</sup> According to his view, the second phase started in 1990 and ended in 1995 with the collapse of the negotiations between the LTTE and the government of President Chandrika Bandaranayake Kumaratunga. The third phase began in 1995 and ended with the final collapse of the cease-fire agreement in 2006. The fourth and final phase began shortly thereafter and lasted until 2009 when the LTTE was finally defeated.<sup>15</sup> However, most of the Sri Lankan Scholars and military experts divided the history of civil war into five parts: Eelam War I (1983-1987), the Indian intervention (1987-1990), Eelam War II (1990-1994), Eelam War III (1995-2001), and Eelam War IV (2005-2009).<sup>16</sup>

## *7.2 Sri Lankan Civil War as a Non-International Armed Conflict*

A non-international armed conflict can be identified as an armed conflict that can be occurred between governmental authorities and organized armed groups or between such groups within a State.<sup>17</sup> According to Additional Protocol II for the Geneva Conventions, armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control

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<sup>12</sup> Joanne Richards, *An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)*, The Centre on Conflict, Development and Peacebuilding, 2014, p.12.

<sup>13</sup> *ibid*, p.13.

<sup>14</sup> The Indian peace Keeping forces came into Sri Lankan territory according to the Indo-Sri Lanka Peace Accord signed in Colombo on 29 July 1987, between Indian Prime Minister Rajiv Gandhi and Sri Lankan President J. R. Jayewardene.

<sup>15</sup> Sumit Ganguly, *Ending the Sri Lankan Civil War*, American Academy of Arts & Sciences, Vol. 147, No. 1, *Ending Civil Wars: Constraints & Possibilities* (Winter 2018), pp. 78-89.

<sup>16</sup> Nisala A. Rodrigo, *The Rise of the Liberation Tigers: Conventional Operations in the Sri Lankan Civil War, 1990-2001*, School of Advanced Military Studies US Army Command and General Staff College Fort Leavenworth, KS, 2019, p.4.

<sup>17</sup> ICTY, *The Prosecutor v. Dusko Tadic, Judgment*, IT-94-1-T, 7 May 1997, para. 70.

over a part of its territory as to enable them to carry out sustained and concerted military operations, can be identified as NIACs.<sup>18</sup>

ICRC defines that the term "civil war" has no legal meaning. It is used by some legal and political scholars to refer to a non-international armed conflict.<sup>19</sup> Thus, the 30-year armed conflict between the Sri Lankan government and the LTTE, defined as a 'civil war', can also be interpreted as NIAC under IHL definitions.

However, there is a great deal of reluctance among states to regulate civil wars under the terms of IHL, which is mainly because states are not willing to give up their sovereign power to decide how to deal with domestic outbreaks of violence.<sup>20</sup> It is for this reason that the Sri Lankan government was also reluctant to identify the armed conflict with the LTTE as a non-international armed conflict. Therefore, Sri Lanka always tried to respond to acts of terror done by LTTE under domestic criminal law.<sup>21</sup>

### *7.3 Asymmetric nature of the Sri Lankan Civil War*

“War on terror” can be categorized as a form of Asymmetric Warfare. The government of Sri Lanka defined the armed conflict against the LTTE as a “war on terror”. In that sense, the ‘civil war in Sri Lanka’ also can be identified as an asymmetric war.

According to UN Security Council Resolution No: 1566, the LTTE can be classified as a terrorist organization. LTTE has been proscribed, designated or banned as a terrorist group by many states. In 1992 India was the first to ban LTTE following the assassination of Prime-minister Rajiv Gandhi. USA banned LTTE as a ‘Foreign Terrorist Organization’ in 1997. Also, in 2000 UK designated LTTE as a Proscribed Terrorist Group under the UK Terrorism Act of 2000. The

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<sup>18</sup> Additional Protocol – II, 1977, Article 1(1).

<sup>19</sup> <<https://www.icrc.org/en/doc/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm>> (Accessed on 2021 October 20).

<sup>20</sup> Frida Lindström, *Asymmetric warfare and challenges for international humanitarian law Civilian direct participation in hostilities and state response*, Uppsala University, 2012, p.17.

<sup>21</sup> Sri Lanka enacted a number of anti-terrorism laws, such as the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

European Union comprising 28 nations declared LTTE as a Terrorist Organization on 17 May 2006.<sup>22</sup>

Compared to other terrorist groups in the global context, LTTE was a well-organized terrorist group that even possessed an air wing and even a naval fleet.<sup>23</sup> However, Sri Lanka and the international community strictly criticized the LTTE's unconventional methods and tactics used in the warfare, such as suicide bombings, recruitment of child soldiers, using human shields and direct attacks on civilians. Therefore, the Sri Lankan government interpreted that LTTE would not be received any protection under the principles of IHL. Although Sri Lanka was able to end up the civil war militarily by 2009, Sri Lanka was also accused of committing violations of IHL during the latter part of the war. Therefore, there is international pressure on Sri Lanka to expedite the transitional justice process after the war. Finally, it can be concluded that the asymmetrical nature of the Sri Lankan civil war has created a legal and militaristic ambiguity.

## 8. Findings and Recommendations

The notion of asymmetrical conflict cannot be restricted to armed conflicts between states and non-state entities, for such a conflict may involve states in an international armed conflict within the meaning of IHL. However, most challenging legal interrogations do arise in armed conflicts between states and various non-state entities.

Common Article 3 of the Geneva Conventions does not clarify the notion of ‘an armed conflict not of an international character.’ Some authors argue that ‘no definition would be capable of capturing the factual situations that reality throws up and that a definition would thus risk undermining the protective ambit of humanitarian law’ Also, according to article 1(2) of the 2nd Additional Protocol of 1977 for the Geneva Convention, IHL shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. Thus, states use these narrow interpretations to their advantage in identifying the internal armed uprisings.

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<sup>22</sup>Foreign Ministry, Sri Lanka, <https://mfa.gov.lk/ltte-should-be-subjected-to-international-laws/> (Accessed in 2021 October 20).

<sup>23</sup> Joanne Richards, *An Institutional History of the Liberation Tigers of Tamil Eelam (LTTE)*, The Centre on Conflict, Development and Peacebuilding, 2014. pp. 13-35.



According to Article 1(1) of the Additional Protocol – II, an organized armed group should act under responsible command, exercise such control over a part of its territory to enable them to carry out sustained and concerted military operations. Under this provision, if an armed group does not meet the above characteristics, such group will not be recognized as an organized armed group. This narrow definition makes de facto ambiguities in recognizing armed groups in internal asymmetric warfare.

As a fundamental rule in International Humanitarian Law, civilians cannot be targeted unless they participate in direct hostilities. Combatants can be targeted at all times, but in contemporary asymmetric armed conflicts, there is an ambiguity in assigning the status of “combatant” to irregular fighters such as guerilla combatants and terrorists. This means that there is a need for examining the legal situation and to come up with solutions for how these problems should be addressed.

Every state has the freedom of non-intervention of sovereign matters. Article 3 of the AP – II stipulates that “Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.” Therefore, it is clear that international law can do nothing before state sovereignty. Accordingly, International Law would not be the *grundnorm* of a domestic legal system.

Hobbes says that ‘Law neither makes the sovereign nor limits sovereign’s authority; it is might that makes the sovereign and law is merely what sovereign commands.’ Although international law is a creation of sovereign states, there is a paradoxical relationship between state sovereignty and International Law. The foundation of international law consists of two elements unequally yoked together, one linked to the sovereignty of the nation-state and one founded on the supra-conventional principle that States at least should be held to the standards they invoke against others.

However, at last, all the states and respective governments have the power to determine what would be legitimate and what would be illegitimate within their territory. In this sense, the respective state has the sole authority to determine whether an internal armed uprising is a non-international armed conflict or a mere riot.

## 9. Conclusion

In the conclusion, this research proposes three recommendations for the development of the contemporary framework of International Humanitarian Law. First, the states should recognize a substantial amount of customary international law applicable to both international and non-international armed conflicts. For this purpose, an international treaty obligation should be created. Secondly, asymmetric warfare such as insurgency and the internal war on terrorism should be considered as non-international armed conflicts. The definition of armed group identification needs to be further expanded. Thirdly, the classification of armed conflicts should be revised to include the transnational war on terrorism and proxy wars as internationalized armed conflicts.

Today, International Humanitarian Law has to face the challenge of taming asymmetric warfare. Novel legal instruments governing these types of conflicts in more detail would certainly be helpful. Therefore, this paper seeks to show that conventional legal parameters need to be changed to apply to most asymmetrical non-international armed conflicts in the 21<sup>st</sup> century.

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